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Supreme Court of the United States

OCTOBER TERM, 1936

No. 573

HIGHLAND FARMS DAIRY, INCORPORATED, and LUTHER W. HIGH, *Appellants*,

vs.

J. S. AGNEW, CHAIRMAN; KONE BRUGH and T. R. SNAVELEY, as MEMBERS OF THE MILK COMMISSION OF THE COMMONWEALTH OF VIRGINIA, *Appellees.*

Brief of Appellees

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LEWIS PRINTING CO., INC., RICHMOND, VA.

Subject Index

		Page
I.	JURISDICTION	1
II.	STATEMENT OF THE CASE	1-12
III.	SUMMARY OF ARGUMENT	12
IV.	ARGUMENT	14
POINT 1.	THE VIRGINIA LEGISLATURE HAS FOUND AND DECLARED THE EXISTENCE OF FACTS JUSTIFYING THE ENACTMENT OF THE LAW AND THE DELEGATION OF THE POWERS THEREBY MADE TO ADMINISTRATIVE BOARDS	14
POINT 2.	THE VIRGINIA STATUTE DOES NOT UNCONSTITUTIONALLY DELEGATE IMPROPER POWER TO AN ADMINISTRATIVE BODY	32
POINT 3.	THE LICENSING PROVISIONS ARE VALID	37
POINT 4.	THE ENFORCEMENT OF THE STATUTE WILL NOT CONSTITUTE A BURDEN UPON OR UNLAWFUL INTERFERENCE WITH INTERSTATE COMMERCE	41
POINT 5.	SECTIONS 14 AND 16 OF THE ACT NEGATIVE ANY CONSTRUCTION OF THE ACT WHICH WOULD RENDER IT UNCONSTITUTIONAL	68

Table of Cases

	Page
Aetna Ins. Co. v. Hyde, 275 U. S. 440	20
American Exp. Co. v. Iowa, 196 U. S. 133	55
American Steel and Wire Co. v. Speed, 192 U. S. 522	46, 61, 65
Baldwin v. Seelig, 294 U. S. 511	64
Banker Bros. Co. v. Pennsylvania, 222 U. S. 210	61
Bayside Fish & Flour Co. v. Gentry, 297 U. S. 422	51
Block v. Hirsh, 256 U. S. 135	16
Bordens Farm Products Co. v. Baldwin, 293 U. S. 194	19, 52
Bowman v. Continental Oil Co., 256 U. S. 642	61, 62, 70
Brown v. Houston, 114 U. S. 622	46, 47, 53, 61
Brown v. Maryland, 12 Wheat 419	44, 45, 64
Cont. Baking Co. v. Woodring, 286 U. S. 352	40
Douglas v. Noble, 261 U. S. 165	38
Eubank v. Richmond, 226 U. S. 137	35
Field v. Clark, 143 U. S. 649	33
Hampton v. U. S., 276 U. S. 394	33
Haskill v. Kansas Natl. Gas Company, 224 U. S. 217	55
Hegeman Farms v. Baldwin, 293 U. S. 163	52
Hendrick v. Maryland, 235 U. S. 610	48
Hinson v. Lott, 8 Wall. 148	45, 66
Hygrade Prov. Co. v. Sherman, 266 U. S. 497	51
Lehmann v. State Board of Public Accountancy, 263 U. S. 394	38, 40
Lemke v. Farmers Grain Co. 258 U. S. 50	61, 65
Lieberman v. Van De Carr, 199 U. S. 552	38, 39
Matson v. State Board, 297 U. S. 441	57
Mintz v. Baldwin, 269 U. S. 346	49
Nebbia v. New York, 291 U. S. 502	17, 25, 52
Packer Corporation v. Utah, 285 U. S. 105	56

Page

Pacific States Box, etc. Co. v. White, 296 U. S. 176 ..... 18, 20, 32, 33, 35
Pipe Line Cases, 234 U. S. 548 55
P. U. C. v. Landon, 249 U. S. 329 53
Pure Oil Co. v. Minnesota, 248 U. S. 158 68
Raley & Bros. v. Richardson, 264 U. S. 157 57
Ratterman v. Western Union, 127 U. S. 411 63
Rearick v. Penn., 203 U. S. 507 55
Reynolds v. Milk Commission, 163 Va. 957 ..... 20, 33, 38, 41
Schechter Poultry v. United States, 295 U. S. 495 ..... 33, 52
Smith v. Alabama, 127 U. S. 465 49
Smith v. Cahoon, 283 U. S. 553 40
Sonneborn Brothers v. Keeling, 262 U. S. 506 ..... 42, 61, 65
State Board v. Young, 81 Adv. Op. 37 ..... 61, 65
Texas v. Brown, 258 U. S. 466 ..... 65, 67
Turner v. Maryland, 107 U. S. 38 18
West v. Kansas Natl. Gas Co., 221 U. S. 229 55
Wichita R. R. & L. Co. v. P. U. Co., 260 U. S. 48 ..... 33, 34
Willoil Corp. v. Penn. 294 U. S. 169 61
Wilson v. New, 243 U. S. 332 14
Woodruff v. Parham, 8 Wall. 123 ..... 45, 46, 47, 61
Yick v. Hopkins, 118 U. S. 356 38

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Brief of Appellees

I

JURISDICTION

No exception is taken to the jurisdiction of this court insofar as the case involves any Federal question, as it does.

II

STATEMENT OF THE CASE

The Highland Farms Dairy, Incorporated, one of the plaintiffs below and one of the appellants here, is a cor-

poration incorporated under the laws of the State of Virginia, but actually transacts no business in the State of Virginia. All of its activities are in the District of Columbia (see Stipulation R. p. 49, pargs. 1 and 5); while it purchases milk produced in Virginia all deliveries of milk so purchased are made in the District of Columbia by the producers. All milk sold by it is sold and delivered to the other plaintiff, Luther W. High, who "purchases in the District of Columbia under contracts all of the output of bottled milk of the said plaintiff, Highland Farms Dairy, Incorporated" (see Stipulation R. p. 51, par. 10); Luther W. High transports this milk or parts of it, to the Arlington-Alexandria Milk Area in Virginia, and sells at retail to the general public from stores maintained therein for that purpose (see Amended Bill, par. 9, R. p. 3).

The General Assembly of Virginia by act approved March 29, 1934 (Acts of 1934, chapter 357, page 558, Virginia Code 1936 Annotated, sections 1211 (w) to 1211 (m.m), inclusive, a copy of which is in the printed record (hh. 18-30) and is appended to the appellant's brief, pp. 33 to 45, inclusive), commonly known as the "Milk and Cream Act," provided for the regulation and control of the production and sale of milk in Virginia entitled:

> "AN ACT to provide for the supervision, regulation and control of the production, processing, transportation, storage, distribution, and sale of milk and cream; to create a Milk Commission and local milk boards and to define and provide for the functions, duties and powers thereof; to provide for the appointment, suspension, removal, compensation, costs, and expenses of such commission and boards and the members, officers, agents, and em-

ployees thereof; to provide for licensing processors, bottlers, wholesalers, distributors, and retailers of milk and cream, or either; to provide for the raising of funds for the administration of this act and to provide for the disposition of revenue collected hereunder and to impose penalties for violation of the provisions of this act."

The act recited and declared that:

"The production and distribution of milk and cream is an industry upon which, to a substantial degree, the prosperity and health of the people of the Commonwealth of Virginia depend; and the present economic emergency is in part the result of the disparity between the prices of milk and cream and other commodities, which disparity has diminished the power of milk producers to purchase industrial products, has broken down the orderly production and marketing of milk and cream, and has seriously impaired the agricultural assets supporting the credit structure of the Commonwealth; and *local political subdivisions thereof;* and * * * unhealthful, unfair, unjust, destructive and demoralizing economic trade practices have grown up, and are now carried on in the production, sale and distribution of milk, and milk and cream products in the Commonwealth, which impair the dairy industry in the Commonwealth, and the constant supply of pure wholesome milk to the inhabitants thereof, and constitute a menace to the health and welfare of the inhabitants of the Commonwealth * * * and in order to promote the well being of the people of the Commonwealth of Virginia, and to promote the public welfare, public health and public peace, the production, transportation, processing, storage, distribution, and sale of milk and cream *in the Commonwealth of Virginia,* is hereby

declared a business affecting the public peace, health and welfare, which should be supervised and controlled in the exercise of the police power of the Commonwealth in the manner hereinafter provided; * * *." (Italics supplied.)

(Note) Wherever italics are used for emphasis in this brief they are supplied unless otherwise indicated.

Section 2 thereof created a Commission of three members, which by section 3 was declared to be an instrumentality of the Commonwealth, vested with the powers therein conferred. The technical and other services for so far as practicable, of the forces and officers in the Department of Agriculture and Immigration of the Virginia Agricultural Extension Division of the Virginia Agricultural Experiment Station were put at the disposal of the Commission officers of which section 3 sets out in detail the powers of the Commission, amongst others:

(a) "To confer and to cooperate with the legally constituted authorities of other states and of the United States, with a view of securing a uniformity of milk control, * * * and with a view of accomplishing the purposes of this Act * * *."

(b) "To investigate all matters pertaining to the production, processing, storage, transportation, distribution and sale of milk *in* the Commonwealth of Virginia."

(c) "To supervise, regulate, and control the production, transportation, processing, storage, distribution, delivery and sale of milk for consumption *within* the Commonwealth of Virginia."

(e) "To examine into the business, books and accounts of any milk producer, association or producers, or *milk distributors,* their affiliates or subsidiaries * * *."

(g) "To make, adopt and enforce all rules, regulations and/or orders necessary to carry out the *purposes* of this Act * * *."

(i) "The commission shall not exercise its powers in any market until a public hearing has been held for *such market,* and the commission determines that it will be to the public interest that it shall so exercise its powers in such market * * *."

It empowered the Commission to:

"* * * withdraw the exercise of its powers from any market after a public hearing has been held for such market, and the commission determines that it will be to the public interest to withdraw the exercise of its powers from such market * * *."

and further provided:

"The commission shall withdraw the exercise of its powers from any market upon written application of a majority of the producers (measured by volume) of milk *produced* and a majority of the distributors (measured by volume) of milk distributed *in* said *market* acting jointly."

(j) "The commission, after public hearing and investigation, may fix the prices to be paid producers and/or associations of producers by distributors *in any market* or markets, may fix the minimum and maximum wholesale and retail prices to be charged for milk in any

> market, and may also fix different prices for different grades of milk."

It contained the further direction that in determining the reasonableness of prices to be charged in any market or markets the Commission

> "* * * shall be guided by the cost of production and distribution, including compliance with all sanitary regulations in force in such market or markets, necessary operation, processing, storage and delivery charges, the prices of other foods, and the welfare of the general public."

Sub-section (k) provides:

> "The commission may require all distributors in any market designated by the commission to be licensed by the commission for the purpose of carrying out the provisions of this act. The commission may decline to grant a license, or may suspend or revoke a license already granted upon due notice and after a hearing."

> "* * * may classify licenses, and may issue licenses to distributors to process or store or sell milk to a particular * * * market or markets within the Commonwealth."

Sub-section (m) vested the Commission with power to define

> "* * * what shall constitute a natural market area, and define and fix the limits of the milkshed or territorial area within which milk shall be produced to supply any such market area; * * *."

and further provided:

> "Any order of the Commission in refusing to issue a license, or suspending or revoking, a license, may be reviewed on appeal to the Supreme Court of Appeals." (Section 6.)

After public hearing, the Commission acting under this statute by order effective April 1, 1936, prescribed the boundaries of the Arlington-Alexandria Sales Area (see R. pp. 38, 39), fixed the minimum prices to be paid producers for milk (R. p. 39); and the minimum retail and wholesale selling prices for milk sold in that area (R. p. 42). The enforcement of these regulations in this area was enjoined by a State court at the instance of a distributor other than the plaintiffs here, pending an inquiry by that court into the alleged unconstitutionality of the law and the order in effect in this area under both the State and Federal Constitutions which injunction was dissolved on or about June 1, 1936 (R. p. 68).

On June 8, 1936, the appellants here filed their bill in the United States District Court for the Eastern District of Virginia at Richmond, to restrain the enforcement of the law alleging as the ground of the jurisdiction of that court that the suit was of a civil nature; that the amount in controversy exceeds the sum of $3,000.00, exclusive of interest and costs, and "arises under the Constitution of the United States."

It set out the nature of the business as above stated, and the order of March 27, 1936, that the plaintiff corporation sold milk to the individual plaintiff, High, in Washington at prices lower than the minimum established; which the plaintiff, High, had continuously sold

at retail to the general consuming public in the area and from stores therein maintained by him, at prices lower than the minimum established and that to require him to sell at the higher prices required by the order would injure the business of both; that under the rules and regulations of the Commission as construed and applied by the board, the board required a distributor to pay to the Milk Board all assessments levied on him by the Milk Board except on milk purchased from licensed distributors that the law regulation adopted as interpreted in their administration by the defendant board operated (1st) as a burden on interstate commerce, it required the plaintiff High to pay a duty on milk purchased from the plaintiff corporation in the District of Columbia and brought into Virginia, a charge he would not have to pay on purchases made from distributors within the Commonwealth; deterred the plaintiff corporation from shipping milk into the Commonwealth of Virginia, and constituted an attempt to regulate commerce among the States in violation of article 1, section 8 of the Constitution (see Bill, par. 26 sub-section A-e, Inc., R. pp. 10-11). (2nd) While the Act declares the existence of an emergency throughout the State the determination of its existence in any part, and, therefore, in all of the State, was in said act improperly delegated to the Milk Commission, for no provision required the Commission to establish milk area or prescribe prices, or rules and regulations except as may be determined by the Milk Commission (see R. p. 13), all in violation of the Fourteenth Amendment to the Constitution.

The bill also charged many other particulars in which their rights under the Federal Constitution, as well as under the State Constitution, were violated, but as none

of these are insisted on in the appellants' specifications of error, it will be unnecessary to enumerate them.

The appellees, The Milk Commission of Virginia, filed its answer to said bill (R. p. 70) and admitted as true many of the allegations of fact contained in the said bill; denied the allegations of paragraphs 3 and 4; denied knowledge as to the truth of the allegations contained in paragraphs 5 and 7 of said bill; denied that the Highland Farms Dairy was a distributor under the provisions of the Milk Act, and alleged that he was doing a retail milk business as "High's" in several establishments conducted by him under that title in the Arlington-Alexandria milk area. It admitted that a public hearing upon the establishment of a milk market for the Arlington-Alexandria area was called and held on February 20, 1936; and that Exhibit "C" filed with said bill was a copy of the rules and regulations fixed by the Commission for said market; but denied that said hearing was insufficiently and arbitrarily conducted; and denied that no investigation was made, and that they took no evidence or made no effort to investigate, or failed or omitted to inquire into the reasonableness of prices to be paid or charged, denied the allegation contained in paragraph 18 of said bill that they proceeded, without further investigation, to adopt and promulgate the said rules and regulations, covering the minimum prices to be paid by milk distributors to producers and the minimum wholesale and retail prices to be charged. The answer set out in detail the extent of the investigation conducted by them at these hearings and the scope of information gathered and considered; denied in detail the sub-paragraphs of paragraph 21 of the bill, and denied that either chapter 357 or the rules and regulations adopted pursuant thereto, as interpreted by defendants, either individually or as

Commission, attempts to interfere with and prohibit either of the said plaintiffs from importing into the Commonwealth of Virginia, from the District of Columbia, and expressly disclaimed any such intention or a purpose to require the plaintiff, Highland Farms Dairy, Inc., to purchase milk at the price fixed by the rules and regulations of the Commission, when, as a part of such purchases, the seller ships and exports said milk outside of the Commonwealth of Virginia, that the rules and regulations adopted pursuant thereto, as interpreted by defendants, either individually or as a Commission, requires the plaintiff, Luther W. High, to purchase milk at the price fixed by the rules and regulations of the Commission (or at any other fixed price) when such purchases were made outside of the Commonwealth of Virginia, and expressly disclaim any such intention, but admitted their intention of applying the Milk Act, and the rules and regulations adopted pursuant thereto for the Arlington-Alexandria milk market area, to all sale of milk in intrastate commerce for local consumption and deny that the application of the law and the rules and regulations contravene the provisions of the Fourteenth Amendment to the Constitution of the United States. It further admitted that the purchase of milk and cream by the plaintiff, Luther W. High, from the plaintiff, Highland Farms Dairy, Inc., as alleged by them were transactions in interstate commerce and not subject to the provisions of the Milk Act, or the rules and regulations of the Commission, and the defendants expressly disclaimed any intention of attempting to apply the Milk Act or regulations thereunder to such interstate transactions, and referring to the allegations of subparagraph H of paragraph 21 of the bill said:

> "If it is meant by sub-paragraph H that the plaintiff, Luther W. High, purchases milk and cream from the plaintiff, Highland Farms Dairy, Inc., in the City of Washington, District of Columbia, and imports it into the Commonwealth of Virginia, defendants admit that such traffic is interstate commerce; but, if it is intended to allege that, *because* milk and cream are bought in the City of Washington, District of Columbia, and imported into the Commonwealth of Virginia, and sold by the importer at retail in established places of business in Virginia, defendants deny that such transactions constitute interstate commerce."

There was a stipulation of the facts bearing on these charges and denials, and it is found in the record at pages 49 to 70, inclusive.

It is stipulated (R. p. 51) that the plaintiff, Luther W. High, is engaged in the business of operating retail stores for the sale of ice cream, milk and certain other dairy products in the Commonwealth of Virginia; and in the course and conduct thereof engages in the business of handling and selling bottled milk in and about the Arlington-Alexandria sales area, and has invested in said business in Virginia a sum in excess of $30,000.00, of which sum an amount in excess of $4,800.00 is invested in the places of business operated by the plaintiff in said Arlington-Alexandria sales area; that he purchases in the District of Columbia, under contracts, all of the output of bottled milk of the said plaintiff, Highland Farms Dairy, Inc., and does not purchase from producers or distributors within the Commonwealth of Virginia any milk for resale, but purchases solely and entirely from the plaintiff corporation all of the bottled milk which is sold in his stores. The orders for said bottled milk are telephoned daily and di-

rectly from the several stores operated in the said Arlington-Alexandria sales area to the dairy of Highland Farms Dairy in the City of Washington; and such sales are made to the plaintiff, Luther W. High, in the City of Washington and the delivery of said bottled milk to the said stores is made directly and in the trucks of Highland Farms Dairy, Inc.; that the plaintiff, Luther W. High, sells approximately 3,460 gallons of milk monthly in the Arlington-Alexandria area in the Commonwealth of Virginia to the general public at retail in units and at prices under the minimum prices prescribed.

It further stipulates that no deliveries are made by High to purchasers outside of or away from his several stores; immediate payment is required from purchasers; a deposit is required for the return of the bottle in which the purchased milk is contained; a differential in the prices of the commodities and units sold by the plaintiff at retail and the prices of similar grade commodities and units sold by other distributors in said area who permit charge accounts and furnish delivery service is an essential factor in the plaintiffs' method of competition; "that no legislative investigation into the conditions of the Milk Industry of Virginia was made or conducted by or at the instance of the General Assembly of Virginia as the basis for the enactment of the said chapter."

Upon the hearing of this bill and stipulation, the plaintiffs' bill was dismissed.

III

SUMMARY OF ARGUMENT

It will be seen by reference to the appellants' brief that many of these questions of unconstitutionality charged

in the bill have been abandoned, and that this decree of the District Court is now asked to be reversed under six specifications of error:

A. "No facts existed or exist justifying the enactment of Chapter 357 of the Acts of Assembly, Commonwealth of Virginia, Session 1934, and the Legislature has not found the existence of such facts, but, on the contrary, has undertaken to delegate to the Milk Commission the power of determining the existence vel non of such facts as to particular areas within the State."

B. "The Virginia statute is unconstitutional as constituting an improper delegation of legislative power to an administrative body."

C. "There has not been a suitable legislative investigation or determination of the facts the existence whereof is necessary to sustain the validity of the statute."

D. "The licensing provisions are invalid, as prescribing no standard for the grant, refusal or revocation of licenses."

E. "The enforcement of the statute will be an interference with interstate commerce."

F. "If the statute is void by reason of all or any of the defects herein complained of, it is void in its entirety, notwithstanding the saving clause contained in Section 16."

Each of these specifications is denied. They will be discussed under the following headings:

Point 1. The Virginia Legislature has found and declared the existence of facts justifying the enactment of the law and the delegation of the powers thereby made to administrative boards. Under this heading we will discuss points A and C, above mentioned.

Point 2. The Virginia statute does not unconstitutionally delegate improper power to an administrative body.

Point 3. The licensing provisions are valid.

Point 4. The enforcement of the statute will not constitute a burden upon or unlawful interference with interstate commerce.

Point 5. Sections 14 and 16 of the act in question negative any construction of the act which would render it unconstitutional, in whole or in part.

IV

ARGUMENT

Point 1. The Virginia Legislature has Found and Declared the Existence of Facts Justifying the Enactment of the Law and the Delegation of the Powers Thereby Made to Administrative Boards. Under this Heading We Will Discuss Points A and C Above Mentioned.

We have no quarrel with the appellants' contention that emergency does not create legislative power, as laid down in *Wilson* v. *New,* cited by appellants, 243 U. S. 332, 348, where Mr. Chief Justice White, speaking of the bill there in question, *an act of Congress,* delegating discretionary power to the President, and negativing the thought that the existence of a public right and the public power to preserve it was wholly subject to the preservation of a real or supposed private right, said:

> "Nor is it an answer to this view to suggest that the situation was one of emergency, and that the emergency cannot be made the source of power. Ex Parte Milligan, 4 Wall. 2. 18 L. Ed. 281. The

proposition begs the question, since, although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed. If acts which, if done, would interrupt, if not destroy interstate commerce, may be by *anticipation legislatively prevented,* by the same token the power to regulate may be exercised to guard against the cessation of interstate commerce, threatened by a failure of employers and employees to agree as to the standard of wages, such standard being an essential prerequisite to the uninterrupted flow of interstate commerce."

The court was there speaking of interstate commerce purely within the control of Federal legislation. We are here dealing with *intrastate* commerce and legislation by a sovereign power, which declares:

"The production and distribution of milk and cream is an industry upon which, to a substantial degree, the prosperity and health of the people of the Commonwealth of Virginia depend; and the present economic emergency is *in part* the result of the disparity between the prices of milk and cream and other commodities, which disparity has diminished the power of milk producers to purchase industrial products, has broken down the orderly production and marketing of milk and cream, and has seriously impaired the agricultural assets supporting the credit structure of the Commonwealth and *local political subdivisions thereof.*

And further:

"that unhealthful, unfair, unjust, destructive, and demoralizing economic trade practices have grown up and are now carried on in the productions, sale

> and distribution of milk and milk and cream products in the Commonwealth; * * * which impair the dairy industry in the Commonwealth, and the constant supply of pure wholesome milk."

And that these conditions were such as should be supervised and controlled in the exercise of the police power of the Commonwealth in the manner hereinafter provided. It cannot be denied that the legislature has declared the power as well as the purpose as well as the necessity for all the delegations made.

In *Block* v. *Hirsch*, 256 U. S. 135, 154, also cited by appellants, Mr. Justice Holmes speaking in respect to the war time rent regulation in the District of Columbia, thus expressed and qualified the law in this respect, saying at page 154:

> "No doubt it is true that a legislative declaration of facts that are material only as the ground for enacting a rule of law, for instance, that a certain use is a public one, may not be held conclusive by the courts. *Shoemaker* v. *United States, etc.* (citing cases). But a declaration by a legislature concerning public conditions that, by necessity and duty, it must know, is entitled at least to great respect. In this instance Congress stated a publicly notorious and almost world-wide fact.—That the emergency declared by the statute did exist must be assumed, and the question is whether Congress was incompetent to meet it in the way in which it has been met by most of the civilized countries of the world."

The conditions justifying the rent legislation in the District of Columbia were no more notorious than were those then and now existing respecting the production and marketing of milk. The declarations of the Virginia Legislature was "concerning public conditions that by

necessity and duty it must know and is therefore entitled at least to great respect," especially so in the absence of any semblance of evidence showing that the conditions solemnly recited by the Legislature did not and do not exist.

That the regulations controlling the production and marketing of milk is a matter of public interest and regulation is shown conclusively in *Nebbia* v. *New York*, 291 U. S. 502, where at page 535, Mr. Justice Roberts, speaking for the court said:

> "The touchstone of public interest in any business, its practices and charges, clearly is not the enjoyment of any franchise from the state. * * * Nor is it the enjoyment of a monopoly; for in *Brass* v. *North Dakota*, 153 U. S. 391, 38 L. Ed. 757, a similar control of prices of grain elevators was upheld in spite of overwhelming and uncontradicted proof that about six hundred grain elevators existed along the line of the Great Northern Railroad, in North Dakota; that at the very station where the defendant's elevator was located two others operated; and that the business was keenly competitive throughout the state.
>
> "In *German Alliance Ins. Co.* v. *Lewis*, 233 U. S. 389, 58 L. Ed. 1011, a statute fixing the amount of premiums for fire insurance was held not to deny due process. Though the business of the insurers depended on no franchise or grant from the state, and there was no threat of monopoly, two factors rendered the regulation reasonable. There were the almost universal need of insurance protection and the fact that while the insurers competed for the business, they all fixed their premiums for similar risks according to an agreed schedule of rates."

And again:

> "Statutes prescribing in the public interest the amounts to be charged by attorneys for prosecuting certain claims, a matter ordinarily one of personal and private nature, are not a deprivation of due process."

And again:

> "It is clear that there is no closed class or category of business affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory."

* * * * *

> "The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry for adequate reasons, is subject to control for the public good."

So it thus appears that the control of the price of milk being a matter affected with a public interest is within the police power of the State, and subject to its control.

As stated by Mr. Justice Brandeis in *Pacific States Box and Basket Company* v. *White*, 296 U. S. 176, 80 L. Ed. 138, at page 185:

> "The order here in question deals with a subject *clearly within the scope* of the police power. *Turner* v. *Maryland*, 107 U. S. 38; 27 L. Ed. 370; When such legislative action 'is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence

> of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary.' *Bordens Farm Products Co.* v. *Baldwin*, 293 U. S. 194, 79 L. Ed. 281. The burden is not sustained by making allegations which are merely the general conclusions of law or fact."

It was suggested in that case that though presumptions of fact sufficient to justify the exertion of the police power attaches strongly to acts of the Legislature, as it is here, that no such presumption attaches to the action of an administrative body.

Mr. Justice Brandeis in the same case says on this point:

> "Sixth. It is urged that this rebuttable presumption of the existence of a state of facts sufficient to justify the exertion of the police power attaches only to acts of legislature; and that where the regulation is the act of an administrative body, no such presumption exists, so that the burden of proving the justifying facts is upon him who seeks to sustain the validity of the regulation. The contention is without support in authority or reason, and rests upon misconception. Every exertion of the police power, either by the legislature or by an administrative body, is an exercise of delegated power. Where it is by a statute, the legislature has acted under power delegated to it through the Constitution. Where the regulation is by an order of an administrative body, that body acts under a delegation from the legislature. The question of law may, of course, always be raised whether the legislature had power to delegate the authority exercised. (Citing cases.) But where the regula-

> tion is within the scope of authority legally delegated the presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies. Compare *Aetna Ins. Co.* v. *Hyde*, 275 U. S. 440, 72 L. Ed. 357, 364."

This we think sufficiently disposes of the question as to the power of the Legislature to declare the existence of facts which must be taken as true in the absence of conclusive evidence to the contrary.

We submit further that the question as to whether the Virginia Legislature had the power to delegate any of its functions to an administrative board is a question of local or State law and not of Federal law, and that the Supreme Court of Appeals of Virginia has passed directly on the constitutionality of this statute and upheld it. (See *Reynolds* v. *The Milk Commission*, 163 Va. 957.)

This point was passed on directly in the case of *Pacific States Box and Basket Co.* v. *White*, 296 U. S. 176, 70 L. Ed. 138, where on page 187, Mr. Justice Brandeis speaking for the court, said:

> "It is argued that under the constitution of Oregon, its legislature was without power to delegate the authority to prescribe standard containers, citing *Van Winkle* v. *Fred Meyer*. This objection (which involves solely question of state law) was not made below, and was not discussed by the lower court, and is not included in the assignment of errors filed in this Court. We have no occasion to consider it."

As stated above this question has been conclusively passed on by the Supreme Court of Appeals of Virginia in the *Reynolds Case, supra*, which held that this dele-

gation was within the power of the Legislature, neither was this question within the competency of the trial court because the only ground of jurisdiction was a violation of a Federal right, and does not present a case arising between citizens of different states. The defendant is a citizen of Virginia, and both plaintiffs claim to be residents of the District of Columbia, and therefore though the corporate plaintiff is a Virginia Corporation not residents of different states.

In this connection, however, counsel for the appellants, seek to escape this result and say: "But whatever *prima facie* validity the Act might have is negatived by the terms of the Act itself. The Act, although purporting to find the existence of the facts thought to be sufficient to sustain its validity, is not in fact an exercise of such power as the Legislature might have if the existence of these facts were granted, but on the contrary, provides in section 3 (1), (*infra*, p. 38) that the Milk Commission shall not exercise its powers in any market until it determines after a hearing, that it will be to the public interest that it so exercise its powers in such market."

We submit that there is no substance in this argument. The purport of the legislation is entirely misconceived by counsel for the appellants.

The Act in question must be construed in a commonsense way. The declaration is not that these conditions exist in every nook and corner of the Commonwealth. It would be unreasonable to place such a construction upon this Act in view of all of its provisions, and the well known diversity of the interests of the State.

The Act does declare that the "production and distribution of milk and cream is an industry upon which, to a substantial degree, the prosperity and health of the people of the Commonwealth of Virginia depend; that the pres-

ent economic emergency is in part the result of the disparity between the prices of milk and cream and other commodities, which disparity has diminished the power of milk producers to purchase industrial products, has broken down the orderly production and marketing of milk and cream, and has seriously impaired the agricultural assets supporting the credit structure of the Commonwealth and *local political subdivisions thereof.*"

In a state which has such diversified industrial and agricultural life as Virginia has, it would be unfair and unreasonable to suppose that the Legislature desired to establish marketing areas for milk in an area which was not engaged in the production of milk and not substantially dependent upon such production. It would also be unfair to say that conditions enumerated in the Act prevailed in every square mile of the State. The declaration is that they are sufficiently extensive to materially affect the welfare of the State as a whole. The Act also by its recital sufficiently sets out the conditions at which the Legislature is aimed, to-wit:

> "An existing disparity between the prices of milk and cream and other commodities" the "Diminished power of milk producers to purchase industrial products" which has "broken down the orderly production and marketing of milk and cream" to an extent which "has seriously impaired the agricultural assets supporting the credit structure of the Commonwealth and local political subdivisions thereof" and "that the unhealthful, unfair, unjust, destructive, demoralizing economic trade practices have grown up and are now carried on in the productions, sale and distribution of milk, and milk and cream products in the Commonwealth"; to an extent "which impair the dairy industry in the Commonwealth and the constant supply of pure wholesome milk to the inhabitants thereof," and "menace

to the health and welfare of the inhabitants of the Commonwealth," and not necessary for all areas in the State without regard to conditions found to exist therein but "in the manner hereinafter provided for."

If it is claimed that the Legislature recognized the existence of these conditions to an appreciable extent in various sections of the State, and the possibility that they did not exist in other sections of the State, what more reasonable and proper provision could have been made to deal with the situation as it was believed to have existed than to appoint a Commission to deal with such situations existing in the local political subdivisions thereof, with a view to accomplishing the purposes of this Act, and clothe it with adequate power

"To investigate all matters pertaining to the production, processing, storage, transportation, distribution and sale of milk in the Commonwealth of Virginia;

"To supervise, regulate and control the production, transportation, processing, storage, distribution, delivery and sale of milk for consumption within the Commonwealth of Virginia.

"To examine into the business, books and accounts of any milk producer, association of producers, or milk distributors their affiliates or subsidiaries; to issue subpoenas to milk producers, associations of producers, and milk distributors, and to require them to produce their records, books and accounts; to subpoena any other person from whom information is desired;

"To take depositions of witnesses, within, or without the Commonwealth of Virginia.

"To make, adopt and enforce all rules, regulations and/or orders necessary to carry out the purposes of this act."

That is all that this law has done. While its inquisitory powers are State-wide, the Legislature has put the further limitation upon them that the Commission

> "* * *shall not exercise its powers in any market until a public hearing has been held for such market, and the commission determines that it will be to the public interest that it shall so exercise its powers in such market, and the commission determines that it will be to the public interest that it shall so exercise its powers in such market."

There is certainly no unreasonable regulation or discrimination in this legislation as to make it counter to any inhibition of the Federal Constitution. This is shown by the fact that the Commission is authorized on its own motion, or upon the written application of a producers association supplying a substantial proportion of the milk consumed in any market, or in the absence of such an association upon the written application of producers supplying a substantial proportion of the milk consumed in such market to make the necessary investigation. It will be observed that none of these provisions are dependent upon the action, either of the producers or the distributors, and that even when called at their instance the discretion of the Commission is not controlled by any but the public interest as declared in the policy declaring provision of the resolution coupled with the further provision that in determining the reasonableness of prices to be charged in any market or markets the Commission

> "* * * shall be guided by the cost of production and distribution, including compliance with all sanitary regulations in force in such market or markets, necessary operation, processing, storage and delivery charges, the prices of other foods, and the welfare of the general public."

Surely there is nothing in any of these provisions which are in any way violative of any of the prohibitions of the Federal Constitution or of the Fourteenth Amendment, which so far as applicable to this case merely provides that

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

An attempt is made to distinguish this law from the principles laid down and accepted by this court in the *Nebia Case*, 291 U. S. 502, where this court said:

> "That statute created a milk control board with power 'to supervise and regulate the entire milk industry of New York State and a direction to ascertain by investigation and proofs what prices for milk in the several localities and markets of the State will best protect the milk industry in the State, and to fix by official order the maximum and minimum wholesale and retail prices to be charged for milk within the State, wheresoever produced."

In other words it is contended that the Virginia Act gives *discretionary* power to the Commission to regulate and control milk while the New York Act is mandatory, and that therefore the law is unconstitutional. A comparison of the provisions of these two laws in parallel columns follows, and shows that with the exception of sub-section (i) of section 3, the provisions of the two statutes although not identical in terms are in substantial accord with each other:

THE NEW YORK LAW

Chapter 158, Article 25, Acts of 1933:

Section 300. Legislative finding; statement of policy. This article is enacted in the exercise of the police power of the state, and its purposes generally are to protect the public health and public welfare. It is hereby declared that unhealthful, unfair, unjust, destructive, demoralizing and uneconomic trade practices have been and are now carried on in the production, sale, and distribution of milk and milk products in this state, whereby the dairy industry in the state and the constant supply of pure milk to inhabitants of the state are imperiled. That such conditions constitute a menace to the health, welfare and reasonable comfort of the inhabitants of the state. That in order to protect the well-being of our citizens and promote the public welfare, and in order to preserve the strength and vigor of the race, the production, transportation, manufacture, storage, distribution and sale of milk in the state of New York is hereby declared to be a business affecting the public health and interest. That the production and distribution of milk is a paramount industry upon which the prosperity of the state in large measure depends. That the present acute economic emergency, being in part the consequence of a severe and increasing disparity between the prices of milk and other commodities, which disparity has largely destroyed the purchasing power of milk producers for industrial products, has broken down the orderly production and marketing of milk and has seriously impaired the agricultural assets supporting the credit structure of the state and its local governmental subdivisions. That the danger to the public health and welfare is immediate and impending, the necessity urgent and such as will not admit of delay in public supervision and control in accord with proper stand-

THE VIRGINIA LAW

Whereas, the production and distribution of milk and cream is an industry upon which, to a substantial degree, the prosperity and health of the people of the Commonwealth of Virginia depend; and the present economic emergency is in part the result of the disparity between the prices of milk and cream and other commodities, which disparity has diminished the power of milk producers to purchase industrial products, has broken down the orderly production and marketing of milk and cream, and has seriously impaired the agricultural assets supporting the credit structure of the Commonwealth and local political sub-divisions thereof; and

Whereas, unhealthful, unfair, unjust, destructive and demoralizing economic trade practices have grown up, and are now carried on in the production, sale and distribution of milk, and milk and cream products in the Commonwealth, which impair the dairy industry in the Commonwealth, and the constant supply of pure wholesome milk to the inhabitants thereof, and constitute a menace to the health and welfare of the inhabitants of the Commonwealth; and

Whereas, in order to protect the well-being of the people of the Commonwealth of Virginia, and to promote the public welfare, public health and public peace, the production, transportation, processing, storage, distribution, and sale of milk and cream in the Commonwealth of Virginia, is hereby declared a business affecting the public peace, health and welfare, which should be supervised and controlled in the exercise of the police power of the Commonwealth in the manner hereinafter provided; now, therefore,

ards of production, sanitation and marketing. The foregoing statements of fact, policy and application of this article are hereby declared as a matter of legislative determination.

Section 301. Definitions. * * *

* * * * *

"Market" means any city, town or village of the state, or two or more cities and/or towns and/or villages and surrounding territory designated by the board as a natural marketing area.

Section 303. General powers. The board is hereby declared to be the instrumentality of the state for the purpose of attaining the ends recited in the legislative finding, statement of policy and application of article, and is hereby vested with power:

(a) To supervise and regulate the entire milk industry of New York state, including the production, transportation, manufacture, storage, distribution, delivery and sale of milk and milk products in the state of New York * * *.

(b) To investigate as the emergency permits and regulate as the emergency requires all matters pertaining to the production, manufacture, storage,

The Virginia Law—Continued

1. Be it enacted by the General Assembly of Virginia, as follows:

"Market" means any city, town or village of the Commonwealth, or two or more cities and/or towns and/or villages and surrounding territory designated by the commission as a natural marketing area.

Section 3. Powers.—The commission is hereby declared to be an instrumentality of the Commonwealth, vested with power:

(a) To confer and co-operate with the legally constituted authorities of other states and of the United States, with a view of securing a uniformity of milk control, with respect to milk coming into the Commonwealth and going out of the Commonwealth in interstate commerce, with a view of accomplishing the purposes of this act, and to enter into a compact or compacts for such uniform system of milk control.

(b) To investigate all matters pertaining to the production, processing, storage, transportation, distribution and sale of milk in the Commonwealth of Virginia.

transportation, disposal, distribution and sale of milk and milk products in the state of New York. * * *

The Virginia Law—Continued

(c) To supervise, regulate, and control the production, transportation, processing, storage, distribution, delivery and sale of milk for consumption within the Commonwealth of Virginia.

(i) The commission shall not exercise its powers in any market until a public hearing has been held for such market, and the commission determines that it will be to the public interest that it shall so exercise its powers in such market. The commission may, on its own motion, call such hearing, and shall call such hearing upon the written application of a producers' association organized under the co-operative marketing act of the Commonwealth of Virginia, supplying in the judgment of the commission a substantial proportion of the milk consumed in such market, but if no such producers' association exists on said market, the commission shall call such hearing upon the written application of producers supplying a substantial proportion of the milk consumed in said market; and shall call such hearing upon the written application of distributors, distributing a substantial proportion of the milk consumed in such market. Such hearing may be held at such time and place and after such notice as the commission may determine.

There is nowhere in the New York law any provision that the Commission shall extend its regulations to *all* sections of the State whether there is any public necessity therefor or not. Neither does the Virginia Act in any way restrict its application to the entire State. The fact that it requires a public hearing before a mar-

ket is established while the New York Act contains no such requirement cannot be construed as making a difference in the State-wide application of each of the Acts. Should it be contended that there is no presumption of the existence of the necessary facts, so far as the Commission is concerned, and that there are no specific findings on these particular points upon which the declared policy is based, the answer is found in the opinion of this court in *Pacific States Box and Basket Company* v. *White,* 296 U. S. 176; 80 L. Ed. 138, where at page 186, Mr. Justice Brandeis says:

> "Here there is added reason for applying the presumption of validity; for the regulation now challenged was adopted after notice and public hearing as the statute required. It is contended that the order is void because the administrative body made no special findings of fact. But the statute did not require special findings; doubtless because the regulation authorized was general legislation, not an administrative order in the nature of a judgment directed against an individual concern."

Point 2. The Virginia Statute Does Not Unconstitutionally Delegate Improper Power to An Administrative Body.

The second point relied on by appellants is:

> "THE VIRGINIA STATUTE IS UNCONSTITUTIONAL AS CONSTITUTING AN IMPROPER DELEGATION OF LEGISLATIVE POWER TO AN ADMINISTRATIVE BODY."

What has already been said in discussing the first and third points, (a) and (c), in the appellants' brief, is a

complete answer to this proposition, especially the extract from *Pacific States Box and Basket Company* v. *White,* 296 U. S. 176, because it involves solely a question of State law, which has been passed on by the Supreme Court of Appeals of Virginia in *Reynolds* v. *The Milk Commission of Virginia, supra.*

The cases cited by the appellants to support this contention in this respect are: *Field* v. *Clark,* 143 U. S. 649; *Hampton* v. *United States,* 276 U. S. 394, and *Schechter Poultry Corporation* v. *United States,* 295 U. S. 495, and *Wichita R. R. & Light Company* v. *Public Utilities Commission of the State of Kansas,* 260 U. S. 48, 59.

It is sufficient to say that each of these cases, except the last, involved Federal statutes undertaking to delegate legislative authority to the President of the United States or other executive officers. In the first named case, *Field* v. *Clark,* the President was authorized to suspend certain tariffs when he should be satisfied that the discriminating duties of certain "foreign nations," so far as they operate to the disadvantage of the United States, have been abolished, while recognizing Congress can not delegate legislative power to the President; the court said at page 670:

> "The words 'he may deem,' in the third section, of course implied that the President would examine the commercial regulations of other countries producing and exporting sugar, molasses, coffee, tea and hides, and form a judgment as to whether they were reciprocally equal and reasonable, or the contrary, in their effect upon American products. But when he ascertained the fact that duties and exactions, reciprocally unequal and unreasonable, were imposed upon the agricultural or other products of the United States by a country producing

> and exporting sugar, molasses, coffee, tea or hides, it became his duty to issue a proclamation declaring the suspension as to that country, which Congress had determined should occur. He had no discretion in the premises except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy established by Congress."

This is equally true here.

In *Wichita R. R. & Light Company* v. *Public Utilities Commission of the State of Kansas,* 260 U. S. 48, 59, while it involved the construction of a state statute in a suit between the Public Utilities Commission of Kansas and a West Virginia Corporation, and therefore residents of different states, which statute had never been construed by the Kansas court, even in that opinion the court recognized the principles here involved in the following language:

> "That maxim that a legislature may not delegate legislative power has some qualifications, as in the creation of municipalities, and also in the creation *of administrative boards to apply to* the myriad details of rate schedules the regulatory police power of the state. The latter qualification is made necessary in order that the legislative power may be *effectively exercised.* In creating such an administrative agency, the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its functions. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined, and show a substantial compliance therewith, to give validity to its action."

So outside of the question of this being purely a question of State law, as stated in the case of *Pacific States Box and Basket Company* v. *White, supra,* the Virginia statute in creating this administrative agency did enjoin upon it a certain course of procedure and rules of decision, but did not enjoin as a condition precedent to an order the making of findings of fact. It only required a public hearing after notice that the Commission in fixing prices should take into consideration certain enumerated elements, all of which have been complied with, and there is not a particle of evidence to show there was any departure or violation of these principles.

Counsel for the appellants contend that even though there is no unlawful delegation of legislative power to the board, that that paragraph of sub-section (i) of section 2, directing the Commission to withdraw the exercise of its power "from any market upon written application of a majority of the producers measured by volume of milk produced and a majority of the distributors measured by volume of milk distributed in said market, acting jointly," is unconstitutional, and cite in support thereof *Eubank* v. *Richmond,* 226 U. S. 137, 143. This provision is not subject to the criticism to which the city ordinance was subjected by the court, which said:

> "It leaves no discretion in the committee on streets as to whether the street line shall or shall not be established in a given case. The action of the committee is determined by two-thirds of the property owners. * * * One set of owners determines not only the extent of use, but the kind of use which another set of owners may make of their property. In what way is the public safety, convenience or welfare served by conferring such power?"

The declaration of the purposes of this act show that one of its primary purposes is to protect producers and distributors of milk from the evils prevalent in some sections of the State and enumerated in the Act, and to restore the disparity between the prices of milk and cream which has diminished the powers of milk producers to purchase industrial products, has broken down the orderly production of marketing milk and seriously impaired agricultural assets and also to protect them against "unhealthful, unfair, unjust, destruction and demoralizing economic trade practices," which have grown up "and are now carried on in the production, selling and distribution of milk and cream products in the Commonwealth which impair the dairy industry in the Commonwealth," and that the Legislature also thought that if it was the combined wish of the producers and distributors of milk in any given market area, that these results no longer existed; and should request that the Commission withdraw its activities from their market; that the Commission must withdraw.

But granting this provision does delegate unauthorized legislative power to producers and distributors for whose protection the law was primarily intended and is therefore unconstitutional, still it is separable and under the language of the Act itself:

> "Section 16. Constitutionality. 'If any section, clause, or sentence, or paragraph shall be declared unconstitutional for any reason, the remainder of the act shall not be affected thereby' "

it leaves the residue of the Act unimpaired.

Point 3. The Licensing Provisions Are Valid

The appellants controvert this in their Point "D".

This contention deals with section 3 (k) of the Act, and is dealt with very conclusively in the opinion of Circuit Judge Soper (R. p. 87), where at page 99, he says:

> "The plaintiffs emphasize the license provisions of the act, contending that here, in any event, are provisions so devoid of legislative standard as to leave to the Commission the unrestricted power to grant or refuse a license to a dealer in milk in its arbitrary discretion; and it is contended that these provisions not only involve an unlawful delegation of power, but in their effect amount to a denial of due process of law guaranteed by the Fourteenth Amendment."

After quoting at length the provisions of section 3 (k), sections 5, 6, 8, and sections 12 and 13 of the Act, he says at page 101:

> "The stipulation shows that the Milk Commission has threatened to invoke against High the remedy by injunction provided in Section 12 of the act, so as to restrain him from continuing his business as a milk dealer without first having obtained the required license, and also from violating the regulations of the commission as to retail sale prices. It does not appear that High has ever made application for a license or intends so to do; and the only reasonable inference to be drawn from the institution and prosecution of this case is that the plaintiffs, regarding the act as unconstitutional, propose to continue their trade practices irrespective of its provisions.
>
> "On the other hand, no conditions or restrictions upon the grant of licenses have been imposed in the

regulations of the Board, and there is no indication that a license would be withheld from any one willing to abide by the terms of the statute. In *Reynolds* v. *Milk Commission,* 179 S. E. 507, 514, it was said that the license provision was not challenged. It might be proper also in the pending case to disregard it in the absence of arbitrary and unreasonable conduct on the part of the commission, and of any evidence that such conduct is contemplated.

"Nevertheless, it is not inappropriate to point out that the license provisions of the act should not be interpreted to vest the Board with the absolute power to grant or refuse licenses, if any other reasonable construction can be adopted. Such a grant of power would be invalid and the attempt to exercise it arbitrarily would be restrained by a court of equity as a violation of the due process clause of the Fourteenth Amendment. *Yick* v. *Hopkins,* 118 U. S. 356; *Lieberman* v. *Van DeCarr,* 199 U. S. 552; *Douglas* v. *Noble,* 261 U. S. 165; *Lehmann* v. *State Board of Public Accountancy,* 263 U. S. 394."

We might here add that in addition to what is said Judge Soper said: "The record shows conclusively that not only has no license been denied High, but licenses have been tendered him and he has refused to make application for a license." See affidavit of Philip Rosenfeld, in Stipulation of Facts (R. p. 75, par. 2).

Judge Soper's opinion continues (R. p. 102):

"In our opinion, the act is susceptible of a more reasonable interpretation. It was not the intent of the legislature to confer upon the administrative board the extraordinary power to determine at will who should and who should not engage in the distribution of milk, but rather to render available to

the Milk Commission and the local boards a list of authorized distributors of milk and to enable the authorities more readily to supervise the business of distribution and to enforce the rules, regulations and orders promulgated by the Board.

"In the absence of provision to the contrary, it would appear to be the duty of the Board to issue a license to any distributor complying with the statute and to preserve his license until some violation of the act, or of a regulation or order had taken place. Such a standard would be sufficient to sustain the act although less specific in detail than other similar statutes. In *Lieberman* v. *Van De Carr*, 199 U. S. 552, the Supreme Court considered a section of the Sanitary Code of New York City, which provided that no milk should be received for sale and delivered in the City of New York without a permit in writing from the Board of Health. It was objected that the statute devolved upon the Board of Health absolute and despotic power to grant or withhold permits to milk dealers and was therefore not due process of law. The Supreme Court, commenting on the decisions of the New York courts which indicated the power to issue or withhold permits must be used in the exercise of a reasonable discretion and that arbitrary action and unjust discrimination would not be tolerated said:

> " 'That this court will not interfere because the states have seen fit to give administrative discretion to local boards to grant or withhold licenses or permits to carry on trades or occupations, or perform acts which are properly the subject of regulation in the exercise of the reserved power of the states to protect the health and safety of its people there can be no doubt.'

"After citing certain cases, the court continued:

> " 'These cases leave in no doubt the proposition that the conferring of discretionary power upon administrative boards to grant or withhold permission to carry on a trade or business which is the proper subject of regulation within the police power of the state is not violative of rights secured by the Fourteenth amendment. There is no presumption that the power will be arbitrarily exercised, and when it is shown to be thus exercised against the individual, under sanction of state authority, this court has not hesitated to interfere for his protection, when the case has come before it in such manner as to authorize the interference of a federal court.'

"In *Smith* v. *Cahoon,* 283 U. S. 553, 562, it was said:

> " 'The principle is well established that when a statute, valid upon its face, requires the issue of a license or certificate as a condition precedent to carrying on a business or following a vocation, one who is within the terms of the statute, but has failed to make the required application, is not at liberty to complain because of his anticipation of improper or invalid action in administration.'

"See also *Lehmann* v. *State Board of Public Accountancy,* 263 U. S. 394; *Continental Baking Co.* v. *Woodring,* 286 U. S. 352; *The Problem of Apparently Unguided Administrative Discretion* by Lewis Allen Sigler, 19 St. Louis, L. R. 261, 291, *et seq.*"

In this same connection and speaking of this and other provisions of the Act the Supreme Court of Appeals of

Virginia, construing this very Act, in *Reynolds* v. *Milk Commission,* 163 Va. 957, speaking through Justice Gregory, said:

> "It should also be borne in mind that an act is not to be construed as meaning that regulations promulgated until it will at some future time be exercised capriciously, arbitrarily or inequitably. It will be time enough to complain when, if ever, the power shall be thus abused.
>
> "Then, too, another general principle applicable here is that a state legislature deals with situations from a practical standpoint. It is better qualified than the court to determine the necessity, character and degree of regulation of an industry, which new and perplexing conditions may require; and its conclusions should not be disturbed by the courts unless they are clearly arbitrary and unreasonable."

Point 4. The Enforcement of the Statute Will Not Constitute a Burden Upon or An Unlawful Interference With Interstate Commerce.

"THE ENFORCEMENT OF THE STATUTE WILL BE AN INTERFERENCE WITH INTERSTATE COMMERCE."

This contention of appellants to the contrary, their "Point E" is wholly without merit. The statute, section 14, expressly provides:

> "No provision of this act shall apply to or be construed to apply to foreign or interstate commerce, except in so far as the same may be effective pursuant to the United States Constitution and to the laws of the United States enacted pursuant thereto."

And section 16 provides:

> "If any section, clause, or sentence or paragraph shall be declared unconstitutional for any reason, the remainder of the act shall not be affected thereby."

In addition to this the defendant, Milk Board, in its answer reiterate time again their denial that chapter 357 of the Acts of 1934, or the rules and regulations adopted pursuant thereof, as interpreted by defendants, either individually or as a Commission, attempts to interfere with and prohibit either of the plaintiffs from importing milk into the Commonwealth of Virginia from the District of Columbia, and expressly disclaim any such administrative intention, and deny that the Act requires the Highland Farms Dairy to purchase milk at the price fixed by the rules and regulations of the Commission in Virginia for export, or requires the plaintiff, Luther W. High, to purchase milk at the price fixed by the rules and regulations of the Commission when such purchases are made by him outside of the Commonwealth of Virginia.

It is therefore clear that the only milk over which this Commission claims to possess or to exert jurisdiction is milk held in the State of Virginia for local sale by the defendant, Luther W. High. That milk so held in Virginia from whatever source it is bought is not in interstate commerce and the regulation of the sale thereof is not a regulation of interstate commerce is clearly shown by the great weight of authority. See *Sonneborn Brothers* v. *Keeling*, 262 U. S. 506, 67 L. Ed. 1095, which is directly in point:

Sonneborn Brothers were dealers in petroleum products, with its principal place of business in New York City. It opened an office in Dallas, Texas, and maintained it and connecting warerooms. The Texas law imposed a tax amounting to 2% of the gross sales arising from the sale of oil shipped into Texas and afterwards sold from the storerooms in *unbroken original packages.*

In discussing the question, whether or not the oils so imported were subject to this tax, the court said at page 506, L. Ed. 1097:

> "The question we have to decide is whether oil transported by appellants from New York or elsewhere outside of Texas to their warerooms or warehouse in Texas, there held for sale in Texas in original packages of transportation, and subsequently sold and delivered in Texas in such original packages, may be made the basis of an occupation tax upon appellants, when the state tax applies to all wholesale dealers in oil engaged in making sales and delivery in Texas.
>
> "Our conclusion must depend on the answer to the question: Is this a regulation of, or a burden upon interstate commerce? We think it is neither. The oil had come to a state of rest in the warehouse of the appellants, and had become a part of their stock, with which they proposed to do business as wholesale dealers in the State. The interstate transportation was at an end, and whether in the original packages or not, a state tax upon the oil as property, or upon its sale in the state, if the state law levied the same tax upon the oil or all sales of it, without regard to origin, would be neither a regulation nor a burden on interstate commerce of which this oil had been the subject.
>
> "This has been established so far as property taxes on the merchandise are concerned by a formi-

dable line of authorities; (Citing many cases) * * *

"But the argument is that for articles in original packages, the sale is a final step in the interstate commerce, and that the owner may not be taxed upon such sale, because this is a direct burden on that step. The reasoning is based on the supposed analogy of the immunity from state taxation of imports from foreign countries, which lasts until the article imported has been sold, or has been taken from its original packages of importation and added to the mass of merchandise of the state. This immunity of imports was established by this Court in *Brown* v. *Maryland,* 12 Wheat, 419 6 L. Ed. 678; and was declared in obedience to the prohibition of the Constitution contained in Section 10, Article 1, paragraph 2, providing that

> " 'No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.'

"The holding was that the sale was part of the importation. It is the article itself to which the immunity attaches, and whether it is in transit or is at rest, so long as it is in the form and package in which imported, and in the custody and ownership of the importer, and the state may not tax it. This immunity has been enforced as against a license or occupation tax on the importer in *Brown* v. *Maryland,* 12 Wheat 419; 6 L. Ed. 678 * * *.

"Cases subsequent to *Brown* v. *Maryland,* show that the analogy between imports and articles in original packages in interstate commerce in respect of immunity from taxation attaches to the import itself before sale, while the immunity in case of an article, because of its relation to the interstate commerce, depends on the question whether the tax

challenged regulates or burdens interstate commerce.

"The first of the cases making this distinction is *Woodruff* v. *Parham*, 8 Wall. 123, 19 L. Ed. 382. In that case, Woodruff, an auctioneer in Mobile, received, in the course of his general business, for himself and as consignee and agent for others merchandise from Alabama and from other states, and sold it in unbroken packages. The City of Mobile under its charter, levied a uniform tax on real and personal property, on sales at auction, on sales of merchandise, and on capital employed in the business in the City. Woodruff objected to pay any tax on the auction sales of merchandise from other states in original packages. The question most considered by the Court was whether merchandise exported from one state to another was an export which a state was forbidden to tax by article 1, Section 10, par. 3, of the Federal Constitution, above quoted. It was held that it was not, and that the words 'imports and exports' as there used, referred to and included only merchandise brought in from, or transported to foreign countries. The Court further held that such a tax, which did not discriminate against the sale of goods from other states, but was imposed upon sales of all merchandise, whether its origin was in Alabama or in any other state, was not 'an attempt to fetter commerce among the states.' At the close of the opinion in *Brown* v. *Maryland*, Chief Justice Marshall, made the remark 'that we suppose the principles laid down in this case apply equally to importations from a sister state.' This was pronounced in *Woodruff* v. *Parham*, not to be a judicial decision of the question, but an obiter dictum.

"* * * Immediately following *Woodruff* v. *Parham* in *Hinson* v. *Lott*, 8 Wall. 148; 19 L. Ed. 387, in which was at issue the validity of a provision of the Alabama law, that, before it should be law-

ful for a dealer in introducing spirituous liquors into the state to offer the same for sale, he must pay 50c a gallon thereon. The provision was sustained as not being an attempt to burden interstate commerce, because, by another section of the same law, every distiller of the state was required to pay 50c a gallon on all liquor made by him, and the two sections were complementary, in order to 'make the tax equal on all liquors sold in the state.'

"*Woodruff* v. *Parham* was affirmed and applied in *Brown* v. *Houston,* 114 U. S. 622; 29 L. Ed. 257, where coal mined in Pennsylvania and sent in barges to New Orleans, to be sold after arrival from those barges, without being landed, to a vessel bound to a foreign port, was held, while awaiting sale, to be subject to taxation by the State as property in Louisiana.

"The case of *Woodruff* v. *Parham* has never been overruled but has often been approved and followed, as the cases above cited show. As an authority it controls the case before us, and shows conclusively that the tax in question is valid.

"The distinction between the immunity from state taxation of imports in original packages, and that of articles coming from interstate commerce in original packages, is again brought out with emphasis by Mr. Justice White, aforewards Chief Justice, in *American Steel and Wire Co.* v. *Speed,* 192 U. S. 522; 48 L. Ed. 547. In that case articles of hardware were shipped by the American Steel and Wire Company from their factories in the East to Memphis, Tenn., and there kept in storage in original packages, to be distributed to Arkansas and other states when sold, on orders to be subsequently secured. Memphis, under a general law, imposed a merchant's tax on the Wire Company, based on the average capital invested in the business, and included this stock of original packages in the average. The Court conceded:

> " 'That if these goods were "imports" that they could not be taxed under *Brown* v. *Maryland,* but said: "But the goods not having been brought from abroad, they were not imported in the legal sense, and were subject to state taxation after they had reached their destination and whil'st held in the state for sale" and cited the cases of *Woodruff* v. *Parham* and *Brown* v. *Houston.*'

"Speaking of these cases, the Justice said:

> " 'Those two cases, decided, the one more than thirty-five and the other more than eighteen years ago, are decisive of every contention urged on this record depending on the import and the commerce clause of the Constitution of the United States. The doctrine which the two cases announced has never since been questioned. It has become the basis of taxing power exerted for years, by all the states of the Union'."

Innumerable cases are cited in this opinion to the same conclusion.

It is claimed in appellants' brief that some of the provisions of this Act, taken literally in conjunction with certain definitions in the statute, but without regard to the limitation above quoted from chapter 357, section 14 of the Virginia Act are broad enough to include some persons engaged in interstate commerce, and this it is said invalidates the Act even though the Act itself declares that it does not apply to interstate commerce.

Section 16 further provides:

> "If any section, clause or sentence or paragraph shall be declared unconstitutional for any reason, the remainder of the act shall not be affected thereby."

This contention of appellants is wholly unwarranted, as shown by the opinion of this court in *Hendrick* v. *Maryland,* 235 U. S. 610; 621; 59 L. Ed. 385; 390; where it was held that there is no presumption that the administrative officers of the State are violating a right secured to a non-resident even though the statute may so declare in the absence of some "definite and authoritative ruling" by the courts of the State. In that case the Maryland statute required all the non-residents operating automobiles over the roads of the State to have a permit unless they had complied with the laws of the State of which they were citizens, but the District of Columbia was expressly exempted from this exception.

Mr. Justice McReynolds, delivering the opinion of the court, after referring to this discrimination, said, at page 621, L. Ed. 390:

> "If the statute is otherwise valid, the alleged discrimination against residents of the District of Columbia is not adequate ground for us now to declare it altogether bad. At most they are entitled to equality of treatment, and in the absence of some definite and authoritative ruling by the courts of the State we will not assume *that upon a proper showing this will be denied.*"

And proceeded:

> "The record fails to disclose that Hendrick had complied with the laws in force within the District of Columbia in respect to registering motor vehicles and licensing operators, or that he applied to the Maryland Commissioner for an identifying tag or marker—prerequisites to a limited use of the highways, without cost by residents of other states * * * Only those whose rights are directly affected can

properly question the constitutionality of a state statute, and invoke our jurisdiction in respect thereto."

In *Smith* v. *Alabama,* 124 U. S. 465; 480; 35 L. Ed. 508, 513, where the validity of an Alabama statute forbidding any engineer to operate a locomotive without first undergoing an examination, was under attack, as being a burden on interstate commerce, the court said, speaking through Mr. Justice Matthews:

"But the provisions of the subject contained in the statute of Alabama under consideration are not regulations of interstate commerce. It is a misnomer to call them such. Considered in themselves they are parts of that body of the local laws which, as we have already seen, properly governs the relation between carriers of passengers and merchandise and the public who employ them, which are not displaced, until they come in conflict with express enactments of Congress in the exercise of its powers over commerce, and which, until so displaced according to the evident intention of Congress remain as the law governing carriers in the discharge of their obligations, whether engaged in the purely internal commerce of the State or in the commerce among the States."

INCIDENTAL INTERFERENCE WITH INTERSTATE COMMERCE WILL NOT INVALIDATE A STATUTE OTHERWISE WITHIN THE POLICE POWER OF A STATE.

In *Mintz* v. *Baldwin,* 269 U. S. 346; 77 L. Ed. 1245, the court there dealing with a New York statute, prohibiting the importation into its boundaries of cattle for

dairy or breeding purposes unless certified by the officers of the State of origin to be free from certain diseases, said:

> "Unless the Act itself operates to prevent the enforcement of the order the suit was rightly dismissed. The express exclusion of state inspection extends only to cases where federal inspection has been made and certificate issued. The clauses cannot be read to extend to other cases. The expression of purpose so to limit the exertion of state power strongly suggests that Congress intended not otherwise to trammel the enforcement of the state quarantine measures."

In some way under the provisions of sections 143 to 148, Title 21 U. S. C. the Federal Law prohibits the importation into the United States of any milk from herds not healthy and where a physical examination of such cows has not been made within one year preceding, or when such milk or cream if raw is not produced from cows which have passed the tubercular test within one year, or when the sanitary condition of the dairy farm or plant, in which such milk or cream is produced or handled, does not score certain points. But section 148 provides that nothing in sections 141 to 149 is *"intended nor shall be construed to effect the powers of any state, or any political subdivision to regulate the shipment of milk or cream into, or the handling, sale or other distribution of milk or cream in such state or political subdivision after the milk and/or cream shall have been lawfully imported under the provisions of said section."*

Thus it shows that though the Federal Government permitted the importation of milk and cream from foreign countries under this Act it expressly recognized the reserved power of states to still further regulate the ship-

ment of milk or cream, or the other distribution of such milk or cream, within its own borders.

In *Hygrade Provision Company* v. *Sherman*, 266, U. S. 497; 69 L. Ed. 402, which involved the validity of a New York State Act prohibiting dealers in Kosher meat from falsely representing its character or from selling Kosher meat and non-Kosher meat from the same place without advertising that fact. Mr. Justice Sutherland, delivering the opinion of the court, said:

> "It is enough to say that the statutes now assailed are not aimed at interstate commerce, do not impose a direct burden upon such commerce, make no discrimination against it, are fairly within the range of the police power of the state, bear a reasonable relation to the legitimate purpose of the enactments, and do not conflict with any congressional legislation. Under these circumstances they are not invalid because they may incidentally affect interstate commerce."

See also *Bayside Fish Flour Company* v. *Gentry*, decided March 2, 1936, 297 U. S. 422, 80 L. Ed. 772. The case of *Baldwin* v. *Seelig*, 294 U. S. 511; 79 L. Ed. 1032, is not in conflict with the principles here asserted. That case dealt with a provision of the New York statute construed in the *Nebbia Case*. There is no corresponding provision in the Virginia Statute, to-wit:

> "A provision whereby the protective prices are extended to that part of the supply (about 30%) which comes from other states. The substance of the provision is that, so far as such a prohibition is permitted by the Constitution, there shall be no sale, within the state of milk bought outside unless the price paid to the producers was one that would be lawful upon a like transaction within the State."

This court held this clause unconstitutional, yet in no way intimated such holding would invalidate the balance of the statute, but said on page 519:

> "The validity of that system in its application to producers doing business in New York State has support in our decisions. Citing *Nebbia* v. *New York*, 291 U. S. 502, 78 L. Ed. 940; *Haggeman Farms Corp.* v. *Baldwin*, 293 U. S. 163, 77 L. Ed. 259; *Bordens Farm Products Co.* v. *Baldwin*, 293 U. S. 194, 79 L. Ed. 281."

And on page 526 the court said (in language peculiarly applicable to this case):

> "There are purposes for which merchandise, transported from another state, will be treated as a part of the general mass of property at the state of destination though still in the original containers. This is so, for illustration, where merchandise so contained is subjected to a non-discriminatory property tax which it bears equally with other merchandise produced within the state."

The appellants cite the *Schechter Case—Schechter* v. *United States*, 295 U. S. 495; 79 L. Ed. 1570.

This court invalidated the Act of Congress there involved partly because the transaction sought to be dealt with under the Federal Act was an *intrastate* transaction, although the conditions surrounding it had their origin in interstate commerce. Mr. Chief Justice Hughes, delivering the opinion of the court, said:

> "But the Code provisions, as here applied, do not concern the transportation of the poultry from other States to New York, or the transactions of

the commission men or others to whom it is consigned, or the sales made by such consignees to defendants. When defendants had made their purchases, whether at the West Washington Market in New York City or at the railroad terminals serving the city, or elsewhere, the poultry was trucked to their slaughterhouses in Brooklyn for local disposition. The interstate transactions in relation to that poultry then ended. Defendants held that poultry at their slaughterhouse markets for slaughter and local sale to retail dealers and butchers, who in turn sold directly to consumers. Neither the slaughtering nor the sales by defendants were transactions in interstate commerce. *Brown* v. *Houston,* 114 U. S. 622, 632, (Citing cases)."

Public Utilities Commission v. *Landon,* 249 U. S. 329; 63 L. Ed. 577, is peculiarly applicable to this case.

The Kansas Natural Gas Company, a Delaware corporation, owned a system of pipe lines extending from Oklahoma and Kansas to various terminal towns and cities in Kansas and Missouri, and produced, purchased and transported, distributed and sold natural gas prior to October 9, 1912. During that period by separate agreements it undertook to supply many local companies with gas for ultimate sale to their customers, and to accept therefor a definite proportion—generally two-thirds—of the gross amounts paid by such customers. Permanent physical connections permitted gas to pass from the Gas Company's pipe lines into the several local companies' mains. In October, 1912, the United States District Court for Kansas appointed receivers for the Gas Company, and shortly thereafter extended the receivership to Missouri and Oklahoma. The receivers took over the company's property, affairs, and business, without specifically adopting or disavowing the supply contracts. Sub-

sequently available gas diminished; pipe lines to new wells became necessary; operating costs increased; and the sums received from local distributing companies were inadequate for the receiver's demands.

In 1915 the receivers petitioned the Kansas P. U. C. for higher rates. The Commission authorized what is known as the 28c schedule, much below the rates requested.

The receivers began proceedings against the Kansas and Missouri Commissions, 32 local distributing companies, and 47 cities and towns, alleging that the action by the State Commissions resulted in inadequate and confiscatory rates, and unduly burdened interstate commerce, and that the city ordinances fixing the prices were unreasonable, non-compensatory and confiscatory and prayed injunctions.

The court below held the business carried on by the receivers to be interstate commerce, that the Commission's actions interfered with and thereby burdened interstate commerce, took the receivers property without due process of law, and enjoined the Commission and the distributing companies from interfering with the establishment of such reasonable and compensatory rates as the court might approve.

Mr. Justice McReynolds delivering the opinion of the court said, page 244, L. Ed. 587:

> "We think the trial court properly overruled the objections offered to its jurisdiction, and nothing need be added to the reasons which it gave, P. U. R. 1917 A. 102, 234 Fed. 152, 155. But we can not agree with its conclusions that local companies, in distributing and selling gas to their customers, acted as mere agents, immediate representatives or instrumentalities of the receivers, and as such car-

ried on without interruption interstate commerce set in motion by them.

"That the transportation of gas through pipe lines from one state to another is interstate commerce may not be doubted. Also, it is clear that, as part of such commerce, the receivers might sell and deliver gas to be transported to local distributing companies free from unreasonable interference by the State. *American Exp. Co.* v. *Iowa,* 196 U. S. 133; 143, 40 L. Ed. 417; *West* v. *Kansas Natural Gas Co.,* 221, U. S. 229; 55 L. Ed. 716; *Haskell* v. *Kansas Natural Gas Co.,* 224 U. S. 217; 56 L. Ed. 738;

"But in no proper sense can it be said, under the facts here disclosed, that sale and delivery of gas to their customers at burner tips by the local companies operating under special franchises constituted any part of interstate commerce. The companies received supplies which *had* moved in such commerce, and then disposed thereof at retail in due course of their own *local business.* Payment to the receivers of sums amounting to two thirds of the product of these sales did not make them integral parts of their interstate business. In fact, they lacked authority to engage by agent, or otherwise, in the retail transactions carried on by the local companies. Interstate commerce *is a practical conception* and what falls within it must be determined upon consideration and established facts and known commercial methods. *Rearick* v. *Penn.,* 203 U. S. 507; 51 L. Ed. 295; *Pipe Line Cases* (*United States*) v. *Ohio Oil Co.,* 234 U. S. 548; 58 L. Ed. 1459; The thing which the receivers actually did was to deliver supplies to local companies."

The contention of appellants that the provisions in section 14, shall not be construed as a regulation of interstate commerce, and that section 16 can not be construed

as showing the intent of the Legislature that any constitutional provision should be separable is without merit.

This question was discussed in *Packer Corporation* v. *State of Utah*, 285 U. S. 105, 76 L. Ed. 643, which involved a statute prohibiting tobacco advertising on billboards, street car signs and placards, while permitting it in newspapers and magazines. The court held that where a classification adopted in a state statute with a view to avoiding conflict with the commerce clause of the Federal Constitution can not be deemed arbitrary, and said:

> "The Packer Corporation, a Delaware corporation, engaged in billboard advertising and authorized to do business in Utah, was prosecuted under this statute for displaying a large poster advertising Chesterfield cigarettes on a billboard owned by it and located in Salt Lake City. The poster was displayed pursuant to a general contract for advertising Chesterfield cigarettes, made by the defendant with an advertising agency in the State of Ohio. Both the poster and the cigarettes advertised were manufactured without the State of Utah and were shipped into it by a foreign corporation. The defense was that the state statute violated several provisions of the Federal Constitution."

The court upheld this legislation, and said:

> "It is denied that the State may, under the police power, regulate the business of selling tobacco products."

and added:

> "Action by a state taken to observe one prohibition of the Constitution does not entail the violation of another, *Raley & Bros.* v. *Richardson,* 264 U. S. 157, 160 * * *.
>
> "It is reasonable ground of classification that the state has power to legislate with respect to persons in certain situations, and not with respect to those in a different one."

The same point was determined in *Matson Navigation Company* v. *State Board of Equalization,* decided March 2, 1936, 297 U. S. 441, 80 L. Ed. 791, where Mr. Justice Butler, delivering the opinion of the court, said, page 446, L. Ed. 796:

> "There is no merit in the suggestion that failure of the act to extend to foreign corporations exclusively engaged in interstate or foreign commerce in California constitutes an unconstitutional discrimination against appellants.
>
> "A foreign corporation whose sole business in California is interstate and foreign commerce cannot be subjected to the tax in question."

Surely, if this is true, there is nothing unconstitutional in the state so guarding its legislation that it is incapable of being construed as violative of any Federal inhibition.

Appellants at page 27 of their brief, insist that the tax authorized by section 9 of the Act is a burden upon interstate commerce because milk purchased outside of the state by the distributor is taxed on the same basis that milk purchased inside of the state by the same dealer is taxed.

Section 9 of the Virginia Act reads:

> "The Milk Commission shall prepare an annual budget and shall collect the sums of money required

for this budget from the local milk boards in the form of monthly assessments and the local milk boards shall pay the assessment so levied. The assessment so levied shall not exceed 2c per 100 pounds of milk handled in each market in which the provisions of this Act are in operation."

It is apparent that this tax is not a discrimination against imported milk. Section 11 (b) which is *in pari materia* with section 9, reads:

"The expenses of the milk board, including salaries and/or the per diem of such personnel as the board finds it necessary to employ to properly carry out its functions under this Act, and including the assessment levied by the State Milk Market Commission, shall be met by an assessment of not over 2c per 100 lbs. of milk and/or cream (converted to terms of milk, of 4% butterfat) delivered by distributors and not over 2c per 100 lbs. of milk and/or cream (converted to terms of milk of 4% butterfat) sold by producers."

And Regulation No. 6 (R. p. 44) provides

"Each distributor shall pay to the milk board all assessments levied on him by the milk board except on that milk which has been purchased from *licensed distributors* and shall deduct and pay to the milk board all assessments levied by the board on each producer delivering milk to him. No assessment on producers shall exceed 2c per 100 lbs. of milk and no assessment on distributors shall exceed 2c per 100 lbs. of milk. 1c per 100 lbs. of milk and/or cream shall be levied and collected by the milk board *on all milk* received by a distributor and 1c per 100 lbs. on all milk sold or used by a distributor. Such assessment shall be collected

by the 15th day of each month following the previous delivery period, and delivered to the secretary of the State Milk Commission for deposit to the account of the State of Virginia."

Judge Soper, in dealing with this contention and construing these sections, replies to it unanswerably (R. p. 110, *et seq.*), as follows:

"It thus appears that the milk commission, in order to cover its own expenses, has directed the levy of an assessment of 1c per 100 lbs. on milk received by a distributor and 1c per 100 lbs. on milk sold by a distributor. The local milk board, when set up, would be empowered to levy an additional sum not exceeding the maximum provided in the act to cover its own expenses. The terms of these sections of the act and of Regulation 6 it is urged would require the dairy in Washington, if licensed as a distributor, to handle milk for sale in Virginia, to pay an assessment not exceeding 2c per 100 lbs. on all milk sold by it to High in Washington and shipped by it in interstate commerce, to its stores in Virginia. We need not stop to consider this point for as we have seen, *the dairy is not required by the act to take a license.* (Italics supplied.)

"However, it is also said that even if the dairy be not licensed as a distributor, nevertheless, the assessment would bear upon interstate commerce, because High, purchasing all of the milk sold by him in Virginia from the dairy would be required to pay an assessment thereon of not more than 2c per 100 lbs., and an assessment he would not have to pay under Regulation 6 if he purchased his milk from a Virginia distributor. Under the law, High would not pay an assessment on milk purchased by him from a licensed distributor in Virginia, because the assessment would have already been paid

by the latter. But if High should buy from a producer in Virginia, he would pay for the use of the milk commission 1c per 100 lbs. and the remainder of the assessment would be deducted from the price paid to the producer. Even so, it is difficult to understand how interstate commerce would be burdened or interfered with as a practical matter. Obviously, the sales by the dairy to High in Washington, and the subsequent interstate shipment of the goods would not be curtailed if the dairy, not being subject to Virginia price regulation, could continue to sell cultured whole milk at its wholesale price of 6c per quart as against 11c which a Virginia distributor would be required to charge. The assessment of 2c per hundred pounds paid by High in Virginia would be exactly the same as that borne by milk produced and distributed in Virginia; and the imposition of the assessment puts the merchandise shipped from Washington on equality with all other merchandise in the state, and constitutes no hindrance to the introduction of the goods from Washington into the state for sale upon the basis of equal competition with the local product.

"Furthermore, the assessment is levied upon the goods after they have reached their destination in Virginia and the state has acquired the power to impose a tax or assessment upon them to defray the expenses of the administration of the law. It is well established that there is no burden upon interstate commerce from the imposition of a state tax upon goods which have come to rest in the state at the end of interstate transportation, provided that the state law levies the same tax on all goods of the same sort without regard to their origin. The prohibition contained in Article I, Section 10, Paragraph 2 of the Constitution forbidding a state to lay imposts or duties on imports or exports is not applicable to such a statute and the validity thereof must be determined by deciding whether it

amounts to a regulation of interstate commerce in violation of Article I, Section 8, Paragraph 3 of the Constitution."

After quoting from *Sonneborn Bros.* v. *Cureton*, 262 U. S., 506, Judge Soper continues:

"The same doctrine was applied in *Willoil Corp.* v. *Pennsylvania*, 294 U. S. 169, 175, where it was said: " 'Our decisions show that, if goods carried from one state have reached destination in another where they are held in original packages for sale, the latter has power without discrimination to tax them as it does other property within its jurisdiction.' *Woodruff* v. *Parham*, 8 Wall. 123; *Brown* v. *Houston*, 114 U. S. 622, 632; *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500, 519-522; *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506. 'And as that rule applies whether the burden falls directly or indirectly (*Banker Bros. Co.* v. *Pennsylvania*, 222 U. S. 210) it is not material whether the tax is upon the sale and delivery or upon the property.' "

Appellants, in support of their contention, cite *State Board of Equalization of California* v. *Young*, 81 Advance Opinions, 37, 57 S. C. R. 77; *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50; and *Bowman* v. *Continental Oil Co.*, 256 U. S. 642.

Neither of these cases have any controlling bearing on the point herein at issue.

Bowman v. *Continental Oil Co.*, 256 U. S. 642, 65, L. Ed. 1139, was decided in June, 1921. It involved a license tax imposed by the State of New Mexico upon distributors of gasoline. All of the gasoline handled by the Continental Oil Company was received in interstate commerce, of which part 94 5/10% was sold in

broken packages and about 5 5/10% was sold in original barrels, packages or tank cars, in addition to which the company consumed in the conduct of its own business about 8% of its total sales. The law imposed upon all dealers in gasoline in the state a license tax of $50.00 and in addition, thereto, an excise tax of 2c per gallon on all gasoline sold. The court, apparently holding at that time that sales in original packages was the *sole criteria* for ascertaining whether property continued in its character of interstate commerce, held that the license tax of $50.00 on a dealer whose business consisted in part of selling property received in interstate commerce in the original packages was invalid in its entirety because there was no provision in the law by which the tax could be apportioned, but in the same opinion held that the excise tax of 2c per gallon upon all gasoline sold in intrastate commerce, was valid, though purchased in interstate commerce.

It is clear here that so far as the individual, High, is concerned, all of his sales are intrastate and in quantities desired and no license tax is imposed on him in any way.

In the *Bowman Case, supra,* this court drew this distinction and applied it in the following terms, at page 646:

> "Assuming that, upon the question of construction, the district court was right, and that the act manifests an intent to tax interstate as well as domestic transactions in gasolene" (An assumption which cannot be sustained here in view of the express declaration of the Act itself in Section 14, that it shall not apply or be construed to apply in foreign or interstate commerce) "and is not in this respect capable of separation, still, so far as the

excise tax is concerned,—imposed, as it is, upon the *sale* and *use* of gasolene according to the number of gallons sold and used,—the divisible nature of the subject renders it feasible to control the operation and effect of the tax so as to prevent it from being imposed upon sales in interstate commerce, while allowing the state to enforce it with respect to domestic transactions; and with the allowance of an injunction limited accordingly plaintiff will receive the full protection to which it is entitled under the Constitution of the United States. The applicable rule is that laid down in *Ratterman* v. *Western U. Teleg. Co.*, 127 U. S. 411, 32 L. Ed. 229, where in response to a question whether a single tax, assessed by a state upon the receipts of a telegraph company, derived partly from interstate commerce and partly from commerce within the state, but returned and assessed in gross and without separation or apportionment, was wholly invalid, or invalid only in proportion and to the extent that the receipts were derived from interstate commerce, this court unanimously answered that, so far as levied upon receipts derived from interstate commerce, the tax was void; but so far as levied upon receipts from commerce wholly within the state, it was valid. This case has been cited repeatedly with approval and its principle accepted. (Citing cases.)

"But with the license tax it is otherwise. If the statute is inseparable, then both by its terms and by its legal operation and effect *this* tax is imposed generally upon the entire business conducted, including interstate commerce as well as domestic;"

and again on page 649:

"There is no substance in the objection that the excise tax, as applied to *domestic sales* and *domestic use* of gasolene, infringes plaintiff's rights under the due process and equal protection clauses of the

14th Amendment. The contention that it interferes with interstate commerce because the gasolene is the product of other states already has been disposed of,"

The court then directed the cause to be remanded:

"with directions to grant a decree enjoining the enforcement, as against plaintiff, *of the license tax*, without qualification, and of the excise tax upon the *sale or use* of gasolene only with respect to sales of gasolene brought from without the state into the state of New Mexico, and there sold and delivered to customers in the original packages, whether tank cars, barrels or other packages, and in the same form and condition as when received by plaintiff in that state; but without prejudice to the rights of the state, through appellants or other officers, to enforce collection of the excise tax with respect to sales of gasolene from broken packages in quantities to suit purchasers, notwithstanding such gasolene may have been brought into the state in interstate commerce, and with respect to any and all gasolene used by plaintiff at its distributing stations or elsewhere in the state in the operation of its automobile tank wagons or otherwise;"

It is needless to call attention to the fact that this case, so far as it is based upon the "original package" theory, has been qualified since then, as witness *Baldwin* v. *Seelig*, 294 U. S. 511, 79 L. Ed. 1032, where at page 325, L. Ed. 1039, the court said:

"The test of the 'original package' which came into our law with *Brown* v. *Maryland*, 12 Wheat. 419, 6 L. Ed. 678, is not inflexible and final for the transactions of interstate commerce, whatever may be its validity for commerce with other countries. * * *

> There are purposes for which merchandise, transported from another state, will be treated as a part of the general mass of property at the state of destination though still in the original containers. This is so, for illustration, where merchandise so contained is subjected to a non-discriminatory property tax which it bears equally with other merchandise produced within the state. *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506, 67 L. Ed. 1095; *Texas Co.* v. *Brown*, 258 U. S. 466, 66 L. Ed. 721; *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500, 48 L. Ed. 538 * * *."

The case of *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, 66 L. Ed. 458, held merely that an act of the North Dakota Legislature, undertaking to tax purchasers of grain in interstate commerce, could not be sustained. The fact was that complainant and other buyers of like character bought grain in North Dakota to be immediately shipped to and sold at terminal markets in other states. Upon this showing the court said:

> "This method of purchasing, shipment, and sale is the general and usual course of business in the grain trade at the elevator of complainant and others similarly situated. * * * That such course of dealing constitutes interstate commerce, there can be no question."

The case of *State Board of Equalization of California* v. *Young's Market Co.*, 81 Advance Opinions, 37, in which a state statute confessedly discriminatory against intoxicating liquors produced in another state was upheld under the provisions of the Twenty-first Amendment.

The opinion in that case, instead of sustaining the position of appellants here, is distinctly to the contrary. Mr. Justice Brandeis, at page 78, 57 S. C. R., said:

> "The main contention of the plaintiffs is that the exaction of the importer's license fee violates the commerce clause by discriminating against the wholesaler of imported beer. But there is no discrimination against them *qua* wholesalers. Every one holding a wholesaler's license who is lawfully possessed of any beer may sell it. The fee exacted for the privilege of selling, and the conditions under which a sale may be made, are the same whether the beer to be sold is imported or domestic, or is both. The difference in position charged as a discrimination is not in the terms under which beer may be sold."

This decision can have no unfavorable bearing on the case at bar.

In *Hinson* v. *Lott, Tax Collector,* 8th Wall. 148, 19 L. Ed. 387, the court had under consideration a state act imposing a state tax of 50c per gallon on all intoxicating liquors brought into the state, a tax of like amount being imposed under another section upon all spirituous liquors manufactured in the state. The court held that this was not a burden upon interstate commerce, and said at page 152, L. Ed. 389:

> "The tax in the case before us, if it were of the character we have suggested, discriminating adversely to the products of all other States in favor of those of Alabama, and involving a principle which might lead to actual commercial non-intercourse, would, in our opinion, belong to that class of legislation and be forbidden by the clause of the Constitution just mentioned.
>
> "But a careful examination of that statute shows that it is not obnoxious to this objection. A tax is imposed by the previous sections of the same Act, of fifty cents per gallon on all whiskey and all

> brandy from fruits manufactured in the State. In order to collect this tax, every distiller is compelled to take out a license, and to make regular returns of the amount of distilled spirits manufactured by him. On this he pays fifty cents per gallon. So that when we come, in the light of these earlier sections of the Act, to examine the 13th, 14th and 15th sections, it is found that no greater tax is laid on liquors brought into the State than on those manufactured within it. And it is clear that whereas collecting the tax of the distiller was supposed to be the most expedient mode of securing its payment, as to liquors manufactured within the State, the tax on those who sold liquors brought in from other States was only the complementary provision necessary to make the tax equal on all liquors sold in the State."

This statement of the facts and law there under consideration is identical with those here and is conclusive as to this contention.

It, therefore, appears that whether this tax is construed to be a tax for the purpose of raising revenue or whether it be a tax assessed merely for the purpose of enabling the state to cover the expense of enforcing its police regulations in respect to the production, sale and distribution of milk within the state is neither discriminatory nor a burden upon interstate commerce.

In *Texas Company* v. *Brown*, 258 U. S. 466, 66 L. Ed. 721, 726, Mr. Justice Pitney, speaking for the court in regard to the power of the state to execute its police laws, said:

> "That a state is within its governmental powers in requiring inspection, including tests as to quality, as a safeguard with respect to inflammable substances such as those here involved, when found

within its borders, or even when moving in commerce from state to state (there being no legislation by Congress upon the subject), is well settled. *Pure Oil Co.* v. *Minnesota*, 248 U. S. 158, 162, 63 L. Ed. 180, 188. That, with respect to such substances when they have passed out of interstate commerce, and have come to rest within the state, and become a part of the general mass of property, or have become the subject of domestic commerce, the state may impose inspection fees substantially in excess of the cost of inspection, and thus make them a source of general revenue, is also free from doubt, other than any which may arise from its own Constitution."

Point 5. Sections 14 and 16 of the Act Negative Any Construction of the Act Which Would Render It Unconstitutional.

On page 30, appellants contend under point "F" that if any provision of the statute is void by reason of any or all of the defects complained of, it is void in its entirety, notwithstanding the provisions contained in sections 14 and 16.

The discussion of this point in appellants' brief does not point out any particular provision of this Act which is so interwoven as not to be separable, notwithstanding the express purpose of the Legislature, as stated in section 16, except section 3 (k):

> "The commission may require all distributors in any market designated by the commission to be licensed by the commission for the purpose of carrying out the provisions of this Act. The commission may decline to grant a license, or may suspend or revoke a license already granted upon due notice and after a hearing."

Certainly there can not be any valid claim that under this section there is or can be any lack of due process, or any discrimination. The merit of the several provisions attacked has already been discussed in connection with Points 1-4, and will not be here repeated. The only section in the entire law as to which there can be any doubt as to its validity is that paragraph of section 3, sub-section 1, reading:

> "The commission shall withdraw the exercise of its powers from any market upon written application of a majority of the producers (measured by volume) of milk produced, and a majority of the distributors (measured by volume of milk distributed) in said market acting jointly."

This subject has already been discussed in connection with Point 2 hereof, *supra;* The provision is clearly separable from the residue of the act and if stricken therefrom leaves the remainder of the act in full effective force. That the Legislature so intended it is shown conclusively by Section 16; "If any section, clause, sentence or paragraph shall be declared unconstitutional for any reason, the remainder of the act shall not be affected thereby."

There is a vast difference in provisions of law by which State Milk Commissions are *required* to establish markets upon the request or demand of unofficial persons and the necessity for such Commissions to withdraw markets upon the request or demand of such persons. In the one instance, no market can operate without the approval of unofficial persons; in the other instance, the market becomes operative in all its functions, although it may be withdrawn by unofficial persons. To strike out the provision requiring a market to be established

by individuals, where there is no such request, is to leave the official body without authority to establish a market, and therefore there can be no market. To strike out the provision as to the withdrawal of a market leaves the market in full operation and the authority of the Commission fully operative as to all the provisions of the law under which the Commission acts.

In the *Bowman Case, supra,* this court recognized the authority of the law as applicable to intrastate taxation while it annulled the law as to interstate license and interstate transactions.

The decree of the lower court was clearly right and should be affirmed, whether an emergency Act or permanent legislation.

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> There are purposes for which merchandise, transported from another state, will be treated as a part of the general mass of property at the state of destination though still in the original containers. This is so, for illustration, where merchandise so contained is subjected to a non-discriminatory property tax which it bears equally with other merchandise produced within the state. *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506, 67 L. Ed. 1095; *Texas Co.* v. *Brown,* 258 U. S. 466, 66 L. Ed. 721; *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500, 48 L. Ed. 538 * * *."

The case of *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50, 66 L. Ed. 458, held merely that an act of the North Dakota Legislature, undertaking to tax purchasers of grain in interstate commerce, could not be sustained. The fact was that complainant and other buyers of like character bought grain in North Dakota to be immediately shipped to and sold at terminal markets in other states. Upon this showing the court said:

> "This method of purchasing, shipment, and sale is the general and usual course of business in the grain trade at the elevator of complainant and others similarly situated. * * * That such course of dealing constitutes interstate commerce, there can be no question."

The case of *State Board of Equalization of California* v. *Young's Market Co.,* 81 Advance Opinions, 37, in which a state statute confessedly discriminatory against intoxicating liquors produced in another state was upheld under the provisions of the Twenty-first Amendment.

The opinion in that case, instead of sustaining the position of appellants here, is distinctly to the contrary. Mr. Justice Brandeis, at page 78, 57 S. C. R., said:

"The main contention of the plaintiffs is that the exaction of the importer's license fee violates the commerce clause by discriminating against the wholesaler of imported beer. But there is no discrimination against them *qua* wholesalers. Every one holding a wholesaler's license who is lawfully possessed of any beer may sell it. The fee exacted for the privilege of selling, and the conditions under which a sale may be made, are the same whether the beer to be sold is imported or domestic, or is both. The difference in position charged as a discrimination is not in the terms under which beer may be sold."

This decision can have no unfavorable bearing on the case at bar.

In *Hinson* v. *Lott, Tax Collector,* 8th Wall. 148, 19 L. Ed. 387, the court had under consideration a state act imposing a state tax of 50c per gallon on all intoxicating liquors brought into the state, a tax of like amount being imposed under another section upon all spirituous liquors manufactured in the state. The court held that this was not a burden upon interstate commerce, and said at page 152, L. Ed. 389:

"The tax in the case before us, if it were of the character we have suggested, discriminating adversely to the products of all other States in favor of those of Alabama, and involving a principle which might lead to actual commercial non-intercourse, would, in our opinion, belong to that class of legislation and be forbidden by the clause of the Constitution just mentioned.

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